APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35186

D.C. No.
CV-96-06075-MRH

KDM, a minor, by and through
WJM, his father and next friend,
Plaintiff-Appellant,

v.

REEDSPORT SCHOOL DISTRICT;
NORMA PAULUS, in her official capacity as
Oregon Superintendent of Public Instruction,
Defendants-Appellees.

No. 98-35187

D.C. No.
CV-96-06075-MRH
ORDER

KDM, a minor, by and through
WJM, his father and next friend,
Plaintiff-Appellant-Cross-Appellee,

v.

REEDSPORT SCHOOL DISTRICT,
Defendant,

and

NORMA PAULUS, in her official capacity as
Oregon Superintendent of Public Instruction,
Defendant-Appellee-
Cross-Appellant.

Filed April 25, 2000

Before: Andrew J. Kleinfeld and Michael Daly Hawkins, Circuit Judges, and William W. Schwartzer,[1] Senior District Judge.

Order: Dissent by Judge O'SCANNLAIN.

ORDER

Judge Kleinfeld voted to grant the petition for rehearing and the petition for rehearing en banc. Judge Hawkins voted to deny the petition for rehearing and the petition for rehearing en banc. Judge Schwarzer voted to deny the petition for rehearing and recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, T.G. NELSON, KLEINFELD, TASHIMA, and WARDLAW, Circuit Judges, join, dissenting from denial of rehearing en banc:

Judge Kleinfeld's excellent opinion explains in detail the errors in the panel majority's analysis and its fundamental

[1] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

inconsistency with Supreme Court precedent. I write only to observe that the panel majority's opinion, in crafting a *de minimis* exception to the Free Exercise Clause's requirement of neutrality toward religion, contributes to the growing confusion among the lower courts over the demands of the First Amendment. *See Columbia Union College v. Clark,* 119 S. Ct. 2357, 2358 (1999) (Thomas, J., dissenting from the denial of certiorari). It is only a matter of time before the Supreme Court confronts this confusion to make clear what should have already been clear to a faithful reader of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). While a facially neutral law may be unconstitutional if its true object "is to infringe upon or restrict practices because of their religious motivation," *id.* at 533, a law that is *non-neutral on its face,* like the Oregon regulation at issue here, triggers strict (and almost always fatal) scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus.

It cannot be denied that this case, which simultaneously implicates the Free Exercise, Establishment, and Equal Protection Clauses, involves questions of extraordinary importance. Because the panel majority's opinion misreads Supreme Court precedent and is inconsistent with well-reasoned decisions of our sister circuits, I respectfully dissent from the court's denial of rehearing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35186, 98-35187

KDM, a minor, by and through WJM, his father and next friend,
Plaintiff-Appellant,

v.

REEDSPORT SCHOOL DISTRICT; NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,
Defendants-Appellees.

KDM, a minor, by and through WJM, his father and next friend,
Plaintiff-Appellant-Cross-Appellee,

v.

REEDSPORT SCHOOL DISTRICT,
Defendant,

and

Norma Paulus, in her official capacity as Oregon Superintendent of Public Instruction,
Defendant-Appellee-Cross-Appellant.

Argued and Submitted March 1, 1999.

Filed Nov. 15, 1999.

Before: KLEINFELD and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge.

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Opinion by Judge SCHWARZER; Dissent by Judge KLEINFELD.

SCHWARZER, Senior District Judge:

WJM's son, KDM, is a minor who is legally blind and has cerebral palsy. As such, KDM is a "child with disabilities" entitled to special education and related services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485 (1994). Oregon provides such services to children enrolled in public schools. The Oregon administrative regulation leaves it to the discretion of individual school districts whether to provide such services to children enrolled in private school but specifically provides that "such special education and related services shall be provided in a religiously-neutral setting." OAR 581-15-166 (the "regulation").[1] Defendant Reedsport School District

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[1] OAR 581-15-166 states in full:

> Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> (1) If a child with a disability, who is three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-15-171, the Department of Education shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for delivery of those services.
>
> (2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and

("District") is willing to provide such services to KDM, but not at KDM's parochial school. We must decide whether the District's refusal to provide services at the school violates the IDEA or KDM's rights under the Free Exercise, Establishment, or Equal Protection Clauses of the Constitution.

I. FACTUAL AND PROCEDURAL BACKGROUND

While attending public school, KDM received from the District the services of a vision specialist, physical therapy and special equipment at his school. Motivated by sincerely-held religious beliefs, KDM's parents transferred him to Harbor Baptist Church School ("Harbor Baptist"), a sectarian school. After the transfer, the District continued to supply him with special equipment (braillers, computers and other special equipment) at his new school. However, viewing the Harbor School setting as not religiously-neutral, it no longer supplied the vision specialist at the school. Instead, it provided that service at a fire hall down the street from Harbor Baptist. The adequacy of the service is not in dispute nor is it disputed that it is safe for KDM to travel to and from the fire hall, transportation being provided by the District. The service is provided for approximately ninety minutes

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related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-15-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs.

twice a week. If this service were provided at Harbor Baptist, it would be provided in a room separate from the classroom because providing it in class could be disruptive to the instruction both of KDM and the other students in the classroom.

KDM brought this action through his father, WJM, against the District and Norma Paulus, Oregon's Superintendent for Public Instruction, for declaratory and injunctive relief requiring the defendants to place a vision specialist at Harbor Baptist. Plaintiff, in substance, made three claims: First, that defendants' refusal to provide a vision specialist at School violates the IDEA; second, that it violates the Free Exercise and Establishment clauses of the First Amendment; and, third, that it denies plaintiff the equal protection of the laws. Following a bench trial on stipulated facts, the district court entered judgment holding that the IDEA did not require the district to provide services at a private school, but that the Oregon regulation which permits services to be offered private school students only in a religiously-neutral setting violated the Free Exercise, Establishment and Equal Protection Clauses and enjoined its enforcement.[2] We have subject matter jurisdiction under 20 U.S.C. § 1415(e)(2) and appellate jurisdiction under 28 U.S.C. § 1291 (1994), and review the district court's legal conclusions de novo. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998), *cert. denied*——U.S.——, 119 S.Ct. 1140, 143 L.Ed.2d 208 (1999). We now reverse the judgment.[3]

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[2] The record does not disclose whether Reedsport or other school districts provide services at nonsectarian private schools, but the regulation does not preclude them from doing so.

[3] Because the court entered judgment only on Counts III and IV, plaintiff's constitutional claims, our mandate is limited to those counts.

II. THE IDEA DOES NOT REQUIRE THE DISTRICT TO PROVIDE SERVICES AT KDM's PRIVATE SCHOOL

Plaintiff cross-appealed, contending that the IDEA requires the District to provide KDM with services on site at Harbor Baptist. While the IDEA requires states to provide some measure of special education and related services to disabled children in private schools, *see* 20 U.S.C.A. § 1412(a)(10)(A) and (C) (Supp.1998); *see also* 34 C.F.R. §300.403-.452, since its amendment in 1997, the act has specifically provided that "[s]uch services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law." 20 U.S.C.A. § 1412(a)(10)(A)(i)(II) (emphasis added). Every circuit that has considered whether the IDEA as amended in 1997 requires services to be provided on site at a private school has concluded it does not. *See Foley v. Special Sch. Dist.*, 153 F.3d 863, 865 (8th Cir. 1998) ("Clare and her parents now have no individual right under IDEA to the special education and related services in question, so they have no right to a federal court decree mandating that those services be provided at a particular location."); *Russman v. Board of Educ.*, 150 F.3d 219, 221-22 (2d Cir. 1998) ("[S]tates are required to provide to children voluntarily enrolled in private schools only those services that can be purchased with a proportionate amount of the federal funds received under the program. . . . [The] statute does not require a school district to provide on-site services to a disabled child who is voluntarily enrolled in private school."); *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436-37 (10th Cir.1997) ("[T]he [school district's] sole obligation is to spend on such students. . . 'a proportionate amount of Federal funds,'. . ."); *K.R. v. Anderson Community Sch. Corp.*, 125 F.3d 1017, 1018 (7th Cir. 1997) (affirming prior decision, 81 F.3d 673 (7th Cir.1996), that the IDEA does not require provision of services at a private school), *cert. denied*, 523 U.S. 1046, 118

S.Ct. 1360, 140 L.Ed.2d 510 (1998); *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 233 (5th Cir.1997) ("We therefore hold unambiguously that the defendants were not legally obligated to provide an on- site sign language interpreter to the plaintiff at the private school."). We agree with those courts and conclude that the district court properly declined to grant plaintiff relief under the IDEA.

III. THE OREGON REGULATION AS APPLIED DOES NOT VIOLATE THE FEDERAL CONSTITUTION

A. The Free Exercise Clause

The narrow question before us is whether the free exercise rights of KDM and his parents were impermissibly burdened by the application of Oregon's regulation, which precludes the District from providing special education services to KDM at the sectarian school he attended. In deciding that question we are guided by the distinction the Supreme Court has recognized in the Establishment Clause context between a statute's invalidity on its face and its invalidity in particular applications. *See Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *see also Hunt v. McNair*, 413 U.S. 734, 742, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (examining only "the transaction presently before [the court]" and not "the statute as a whole"); *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1194 n.3 (9th Cir. 1992) (considering "only the validity of one very specific proposed application of the statutes at issue"), *rev'd on other grounds*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). Whatever the impact of the regulation might be in other factually distinct situations, *cf. Zobrest*, 963 F.2d at 1192 (failure to provide sign-language interpreter in the classroom for plaintiff effectively forced his parents to choose between foregoing a sectarian education or paying for the cost of the interpreter themselves) and *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (failure to provide spastic quadriplegic student with needed fulltime paraprofessional while in school forced

choice between foregoing sectarian education or paying for the paraprofessional), this is not a case in which the regulation impinges on plaintiffs' free exercise rights. The parties stipulated that the service provided to KDM at the fire hall down the street from the school twice a week for ninety minutes is in compliance with KDM's statutory individualized education plan, the adequacy of which is not in dispute, and that he could safely travel there-indeed, the vision specialist comes to KDM's school, picks him up and then returns him to his school. Moreover, plaintiffs have stipulated that the vision specialist's services would not be provided in-class at Harbor Baptist but in a separate room. Thus, there is no support for the district court's finding that the regulation forces KDM and his parents to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a nonreligious school and receiving in-class services. In sum, there is no showing that application of the regulation to KDM's case burdens KDM's or his parents' free exercise of their religion.

While the Oregon regulation is not "neutral" because it restricts the provision of services to "religiously-neutral settings," *cf. Employment Division v. Smith*, 494 U.S. 872, 878, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), as applied here it does not have "the object or purpose . . . [of] suppression of religion or religious conduct." *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). KDM is not subjected to "[o]fficial action that targets religious conduct for distinctive treatment." *Id.* at 534, 113 S.Ct. 2217. His case is wholly unlike *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994), involving the deliberate installation by the city of a gate impeding access to a particular revival meeting, or *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), involving an Army regulation banning all religious practice by day care providers on the base. Nor is *Peter v. Wedl* analogous because under the facts of that case, as noted, plaintiff indeed was

forced to choose between enrolling in the sectarian school or receiving services essential to his ability to attend school. 155 F.3d at 1001.

That the regulation, standing alone, "discriminates" against students in religious schools, i.e., treats them differently by denying them state services on the school grounds, does not result in a burden on the free exercise of religion by someone in the position of KDM or his parents. We agree with the court in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), cert. denied,——U.S.——, 120 S.Ct. 329,——L.Ed.2d—— (1999), upholding, against a Free Exercise challenge, a Maine statute funding grants to private schools for students in communities without public education facilities, provided the schools are nonsectarian. The court distinguished *Lukumi* because there was no evidence of "a substantial animus . . . that motivated the law in question." *Id.* at 65. Here, the District's solicitousness in accommodating KDM could hardly be said to reflect a purpose to "suppress[] religion or religious conduct." The mere fact that the District makes its service to KDM available in the fire hall down the street from his school does not amount to suppression of religion or religious conduct.

We conclude that Oregon's regulation as applied to KDM and his parents does not impose an impermissible burden on their free exercise of religion.

B. The Establishment Clause

The district court also found that the Oregon regulation violates the Establishment Clause because it requires the State Superintendent of Education to decide on a case-by-case basis whether particular settings are religious. Since *Zobrest*, the mere presence of a public employee on religious premises clearly is not enough to invoke the Establishment Clause. *See Zobrest*, 509 U.S. at 13, 113 S.Ct. 2462; *see also Agostini v. Felton*, 521 U.S. 203, 234, 117 S.Ct. 1997, 138 L.Ed.2d 391

(1997) ("[A]fter *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment.").

In *Agostini*, the Supreme Court held that monthly visits by supervisors to parochial school classrooms to ensure that remedial education provided by public school teachers remained secular did not result in excessive entanglement under the test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2125, 29 L.Ed.2d 745 (1971). *Agostini* is merely the latest in a line of cases rejecting an entanglement claim when applied to the making of judgments by officials overseeing regulatory schemes concerning the religious character of activities. *See Hernandez v. CIR*, 490 U.S. 680, 696-97, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command." (citations omitted)); *Mueller v. Allen*, 463 U.S. 388, 403, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (finding no entanglement despite the fact that state officials required to determine whether textbooks were religious); *Board of Educ. v. Allen*, 392 U.S. 236, 245, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (same).

We conclude that the regulation does not offend the entanglement prong of the *Lemon* test. We need go no further because the district court did not determine that it offended the first (secular purpose), or second (primary effect to advance or inhibit religion), prong of the test.

C. The Equal Protection Clause

The district court held that the regulation violates the Equal Protection Clause because it "has the effect of allowing in-class services to disabled students at non-religious schools while prohibiting in-class services to disabled students at

religious schools, both public and private. . . . Absent an anti-establishment interest, however, such a distinction lacks a rational, let alone compelling, justification." Because parochial school students are not a suspect class, scrutiny of their treatment by the state is under the rational basis test. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Zobrest*, 963 F.2d at 1197 n.6. While under *Zobrest* the federal Establishment Clause raises no bar to providing on-site services to disabled students at sectarian schools, for purposes of equal protection analysis, Oregon's interpretation of its constitutional separation requirement remains a legitimate state interest. The parties stipulated that "[t]he State of Oregon interprets Article I, § 5, of its constitution to require the provision of special education and related services in a religiously-neutral setting." *See* Or. Const. art. I, § 5; *Lowe v. City of Eugene*, 254 Or. 518, 463 P.2d 360, 364 (1969) (describing art. I, § 5 as an expression of Oregon's commitment to the doctrine of separation of church and state); *see also Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 723 P.2d 298, 312 (1986) (upholding Oregon state statute prohibiting school teacher from wearing religious dress while on duty, finding religious garb incompatible "with the school's commitment to maintaining . . . the atmosphere of religious freedom and neutrality. . .".); *Strout*, 178 F.3d at 67 ("The Maine legislature rationally could have believed that including sectarian schools within its funding scheme would or might violate the establishment clause." (Campbell, J., concurring)); *Luetkemeyer v. Kaufmann*, 364 F.Supp. 376, 382 (W.D.Mo. 1973), aff'd, 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed.2d 134 (1974) (finding no equal protection violation by Missouri's denial of bus service to parochial school student because of state's legitimate interest in maintaining separation of church and state). We conclude that

KDM and his parents have not been denied the equal protection of the laws.[4]

CONCLUSION

The judgment is REVERSED.

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[4] In *Zobrest*, moreover, we rejected an equal protection claim on the ground that the Free Exercise Clause does not create a fundamental right to on-site special education services. *See Zobrest*, 963 F.2d at 1196 n. 6; *see also Norwood v. Harrison*, 413 U.S. 455, 461-62, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973) (denial of public funds to private schools not an equal protection violation). Although this court's judgment in *Zobrest* was reversed on the Establishment Clause ground, the Free Exercise portion of the opinion remains intact. *See Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 562, 45 S.Ct. 441, 69 LEd. 785 (1925) (quoting *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 553-54, 24 S.Ct. 538, 48 L.Ed. 788 (1904) ("[A] judgment of reversal is not necessarily an adjudication by the appellate court of any other than the question in terms discussed and decided.")).

KLEINFELD, Circuit Judge, dissenting:

Under today's decision, the government may discriminate against people based on their exercise of religion, so long as the discriminatory burdens it imposes are not more substantial than requiring a blind child with cerebral palsy to leave his school building and go down the street to a fire hall. That is quite a surprise. Fortunately, that is not the law in most of the rest of the country. The Supreme Court,[1] and the Third,[2] Sixth,[3] and Eighth[4] Circuits have all held to the contrary—the Eighth Circuit in a case materially identical to this one. Unfortunately, that will be the law in this circuit, if the majority opinion stands.

The reason that the majority gets the wrong answer is that it asks the wrong question. The majority formulates the question in this case as whether the regulation requiring special education to be provided in "a religiously-neutral setting" [5] imposes "an impermissible burden on [KDM's and his parents'] free exercise of religion." Because going down the street to the fire hall is only a slight inconvenience, the majority concludes that the government may burden religion to this extent, even though a student with the same afflictions in a private secular school would not have to go down the street to the fire hall for his special education services. As for why treating children in religious schools differently does not violate the Equal Protection Clause, the majority says that because religious school students are not a "suspect class," a

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[1] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

[2] *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994).

[3] *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995).

[4] *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

[5] Or. Admin. R. 581-15-166(3).

rational basis for the distinction is enough, and Oregon's desire to avoid religiosity in education, in order to avoid anything that might amount to an establishment of religion, is a rational basis.

The technical reason why the majority's formulation is wrong is that the majority asks a question developed in cases involving neutral laws of general applicability, even though, as the majority concedes, this case involves a non- neutral law. The substantial burden test has only been applied to free exercise challenges of neutral and generally applicable laws, and it survives *Employment Division v. Smith*,[6] if at all, only where "a neutral, generally applicable regulatory law" [7] implicates a combination of the Free Exercise Clause and another constitutional right, such as "the right of parents . . . to direct the education of their children." [8] The regulation at issue here is not neutral on its face. By requiring a "religiously-neutral setting," the government expressly and intentionally discriminates against religious as opposed to secular private schools. Oregon could lawfully provide the services only in public and not in private schools. But having decided to provide the services in private schools, Oregon cannot discriminate against religious schools without violating the Constitution.

When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be "No!" *Church of Lukumi Babalu Aye, Inc. v. Hialeah*[9] states the test we are required to apply to

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[6] *Employment Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

[7] *Id.* at 880, 110 S.Ct. 1595.

[8] *Id.* at 881, 110 S.Ct. 1595.

[9] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

non-neutral laws such as Oregon's special education regulation. Such a law gets "the most rigorous of scrutiny," must advance " 'interests of the highest order,' " and must be "narrowly tailored."[10] That test, of course, is generally too stringent for any law to pass. Few laws singling out a particular religion or religion in general for special burdens, even slight burdens, can satisfy this test.

The law at issue in this case, requiring special education to be provided in "a religiously-neutral setting,"[11] violates KDM's rights under the Free Exercise and Equal Protection Clauses. Handicapped children at secular private schools get special education in their schools, but handicapped children at religious private schools must leave school to get the same special education. This law violates the Constitution because it distinguishes between people and burdens some of them on account of their religious practices.

The majority puts us at odds with three other circuits to have considered analogous issues. In the rare cases where states have burdened religion, even insubstantially, by laws that are not neutral, courts have almost uniformly held the laws unconstitutional. The only circuit to have considered the proposition that today's majority adopts, that plaintiffs must show a "substantial" or "impermissible" burden for a Free Exercise challenge, has rejected the proposition.

In *Brown v. Borough of Mahaffey,* [12] a municipality erected a gate on public land to obstruct travel through a park to revival services held on adjacent private land. Alternate access was available, and the obstruction was but a slight additional burden for those going to the revival. The Third Circuit rejected the municipality's argument that the plaintiffs

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[10] *Id.* at 546, 113 S.Ct. 2217.

[11] Or. Admin. R. 581-15-166(3).

[12] *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3rd Cir. 1994).

had failed to show that the gate imposed a substantial burden and held that "[t]he rare cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff." [13] The court explained that "[t]he 'substantial burden' requirement was developed in the Supreme Court's free exercise jurisprudence . . . in order to balance the tension between religious rights and valid government goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." [14] "Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such action."[15]

Similarly, in *Hartmann v. Stone*,[16] an army regulation forbid on-base child-care providers from using "[r]eligious materials or activities specifically designed to teach or promote religious doctrine." [17] The Sixth Circuit held that because the regulation was not neutral and generally applicable, it had to be narrowly tailored to serve a compelling state interest; it was not, so the Sixth Circuit held that the Army Regulation violated the Free Exercise Clause. The court expressly rejected the proposition, accepted by today's majority, that a state's desire to assure the fullest compliance with the Establishment Clause was a sufficiently compelling interest to save the regulation.

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[13] *Id.* at 850.

[14] *Id.*

[15] *Id.*

[16] *Hartmann v. Stone*, 68 F.3d 973, 979 (6th Cir. 1995).

[17] *See id.* at 977.

Peter v. Wedl [18] is materially identical to the case we decide today, yet the Eighth Circuit reaches the opposite conclusion from today's majority. In *Peter*, a Minnesota school district rule prohibited special education services from being provided except in religiously "neutral" schools, whether private or public.[19] The Eighth Circuit held that the rule violated the Free Exercise, the Free Speech, and the Equal Protection Clauses. "Government discrimination based on religion violates the Free Exercise Clause of the First Amendment." [20] Like the Sixth Circuit in *Hartmann*, the Eighth Circuit expressly rejected Minnesota's argument that the law was constitutionally valid because of the state's interest in assiduous compliance with the Establishment Clause.

The majority has not offered any persuasive distinction between this case and the Supreme Court decision in *Lukumi* or the Third, Sixth, and Eighth Circuit decisions. The majority says *Lukumi* does not apply here because Oregon's regulation does not have as its object suppression of religion or religious conduct. I am not sure why the majority thinks this is the right question to ask—government discrimination against one or all religions is unconstitutional even if suppression is not the object. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs. . . ." [21] Even if the extent of the burden mattered (which it does not because the Oregon regulation is not neutral toward religion), the exercise of religious convictions is substantially burdened here. Religions have commanded for at least three millennia

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[18] *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

[19] *See id.* at 994.

[20] *Id.* at 995.

[21] *Lukumi*, 508 U.S. at 532, 113 S.Ct. 2217.

that parents educate their children in their religious beliefs. "Therefore impress these My words upon your very heart: bind them as a sign on your hand and let them serve as a symbol on your forehead, and teach them to your children. . ." [22] Under Oregon's regulation, if a blind child with cerebral palsy goes to a secular private school, he gets special education in his school, but if he goes to a religious private school, he has to take a trip down the street for special education. The Free Exercise Clause entitles people to live their lives in accord with their religious beliefs, not just to say their prayers, without having the government intentionally discriminate against them for doing so.

The majority attempts to limit *Lukumi* to situations where there is evidence that substantial animus to repress religion motivated the law in question. That is a misreading. *Lukumi* considered the anti-Santeria animus that motivated an arguably facially neutral law against animal sacrifice as a basis for treating the law as non-neutral. The Court held that "[f]acial neutrality is not determinative . . . . [because t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." [23] Facial discrimination, on the other hand, is almost always determinative. "The Free Exercise Clause protects against governmental hostility which is masked as well as overt." [24] Once there is a non-neutral law, as the majority has conceded that we have here, the test under *Lukumi* is clear—"a law restrictive of religious practices must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." [25] "Animus" reclassifies a facially neutral law as one that targets

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[22] Deuteronomy 11:18-19 (emphasis added).

[23] *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217.

[24] *Id.*

[25] *Id.* at 546, 113 S.Ct. 2217.

religion. "Animus" is immaterial here because the law at issue is not facially neutral, but treats people differently according to whether their school is religious.

The majority fails to adequately distinguish the Third, Sixth, and Eighth Circuit decisions. The majority claims to distinguish *Brown* on the ground that it involved the deliberate burdening of a religious exercise, but that distinction is false; the Oregon regulation at issue here intentionally distinguishes between religious and "religiously-neutral" private schools. That is a deliberate burdening of one, and a benefitting of the other. The majority says *Hartmann* involved a regulation "banning all religious practices by day care providers on the base," but does not say why this should be distinguished from banning all special education services in religious settings. They are the same for this purpose. The majority's attempt to distinguish *Peter* makes no sense because, there, as here, the regulation allowed special education services only at a religiously "neutral site." [26] The majority purports to rely on a fact that was irrelevant to the Eighth Circuit's holding, and quotes only from dictum on an alternative argument that the Eighth Circuit did not reach.[27] That case and this one are, for analytic purposes, carbon copies.

There is no such thing as a *de minimis* exception to the Equal Protection Clause.[28] The government cannot discriminate against people because of their religion, even where the burden it imposes for that reason is only what the majority considers a slight inconvenience. And there is no such thing as a *de minimis* exception to the Establishment

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[26] *Id.* at 994.

[27] *See id.* at 1001.

[28] *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir. 1997).

Clause. *Lee v. Weisman*[29] holds that the "embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that [a clergyman's] prayers [at a public school graduation ceremony], and similar ones to be said in the future, are of a *de minimis* character." [30] It follows that there is also no such thing as a *de minimis* exception to the Free Exercise Clause.

The government can no more discriminate against religion in general than against a particular religion. The claimed interest of Oregon, on which today's majority relies, "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause. . . ." [31] The school would not violate the Establishment Clause by providing the special education services to the handicapped child in this case, which it provides generally to all children in their public or private schools, in his religious school.[32] To the extent that Oregon bases the "religiously-neutral setting" regulation on a "better safe than sorry" approach to the Establishment Clause, the Free Exercise Clause prevents the government from making itself safe from Establishment

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[29] *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

[30] *Id.* at 594, 112 S.Ct. 2649.

[31] *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 846, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause."); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (rejecting compelling state interest in avoiding Establishment Clause violation).

[32] *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1(1993).

Clause challenges by making adherents of religion sorry. The "First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." [33] The Constitution mandates "neutrality between religion and non-religion." [34] "Withholding access would leave an impermissible perception that religious activities are disfavored." [35] Discriminating against religious schools in a program of otherwise general availability makes no sense as a strategy for avoiding an establishment of religion, because "treating everyone the same without regard to religion is hard to see as 'establishing' anything—except equality." [36]

One traditional test of the correctness of a legal proposition is to apply it to a case where we can be confident of the right answer, and see whether the proposition yields the wrong answer. We do the same thing to test a spreadsheet, by entering data where we know what the answer should be to see if the spreadsheet properly generates it. The majority today concludes that so long as the practice of religion is not more substantially burdened than requiring a blind child with cerebral palsy to leave his school building and go down the street for special education services, the government may treat that child less favorably than others on account of his religion. Will this rule yield the right answer if applied to something we would all agree was outrageous, say a government requirement that all Jews wear armbands displaying stars of David? I am confident that today's majority would be as appalled as I am by such a law and would hold it unconstitutional, but it would be hard for the

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[33] *Lukumi*, 508 U.S. at 532, 113 S.Ct. 2217.

[34] *Hartmann*, 68 F.3d at 978.

[35] *Rosenberger*, 515 U.S. at 846, 115 S.Ct. 2510 (O'Connor, concurring) (summarizing the principle of neutrality toward religion).

[36] Eugene Volokh, Equal Treatment Is Not Establishment, 13 Notre Dame J.L. Ethics & Public Policy 341, 345 (1999).

majority to get the right result from its holding in this case. The majority holds today that a law may impose a discriminatory burden on religion, so long as there is a rational purpose for the law and the burden is no greater than requiring a blind child with cerebral palsy to leave his school and go down the street for special education services. The physical burden of wearing the armband is far less. The historical associations with the armband are horrifying, but our government would doubtless have a more beneficient purpose and could articulate some rational basis, perhaps implementation of some public safety or antidiscrimination program. The hypothetical case could be modified to soften the historical association by positing a law requiring adherents of all religions to wear armbands announcing their faiths. Today's majority says the only question is whether the special imposition on religion "impermissibly burden[s] . . . the free exercise rights of KDM and his parents." That cannot be so. Most religions allow their adherents to wear and display symbols of the faith, but that does not entitle the government to require such displays. As the armband example makes clear, and as *Lukumi* makes explicit, that is not the only question. Although the Oregon law imposes no stigma comparable to the armbands, children must learn from the Oregon regulation that their government regards religious schools as bad in some way, places in which it will not deign to provide services available in all other public and private schools, like the "impermissible" perception that religious activities are disfavored in *Rosenberger*.

The Free Exercise Clause prohibits government anti-clericalism as vigorously as the Establishment Clause prohibits government from preferring a particular religion. Our revolution, unlike, say, the French, Mexican, or Russian, evinced no hostility to any organized religion. Our founding manifesto, the Declaration of Independence, says that people are "endowed by their Creator" with their fundamental rights. The Establishment Clause and the Free Exercise Clause are

not in tension, as though one said people can practice their religion, and the other said "but not in public." The Free Exercise and Establishment Clauses complement each other, both advancing the purpose of freedom of religion. One guarantees individuals the right to freely exercise their religion, and the other assures that this free exercise will be unburdened by government preference for a different religion.[37] Americans are entitled to a government that does not discriminate against them because of their religion, even with burdens that those who do not bear them see as merely a slight inconvenience.

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[37] *See* Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 117 (1992).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed Jan 5, 1998]

Civil No. 96-6075-HO

WJM, on behalf of KDM, a minor,
Plaintiff,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS,
Defendants.

JUDGMENT

The decision of the Superintendent is reversed and judgment is entered in favor of Plaintiff on counts three and four of his complaint. Plaintiff is entitled to reasonable attorney fees.

Donald M. Cinnamond. Clerk

/s/ Lea Force
LEA FORCE
Deputy

Dated: January 5, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed Dec 18, 1997]

Case No. 96-6075-HO

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Plaintiff,

v.

REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in her official capacity as Oregon Superintendent of Public Instruction,

Defendants.

ORDER

This is an action challenging the Oregon Superintentdent of Public Instruction's decision that plaintiff's son K.D.M. is not entitled to training by a vision specialist on K.D.M.'s parochial school campus. The Individuals with Disabilities Education Act gives this court jurisdiction and the obligation to review the Superintendent's decision *de novo*. *See* 20 U.S.C. § 1415 (e) (2) (1995).

FACTS

Plaintiff's son K.D.M. is a minor who is legally blind and has cerebral palsy. K.D.M. attends Harbor Baptist Church School, a private religious school in Winchester Bay, Oregon. Defendant Reedsport School District (The District) provides K. D. M. with braillers, computers, and other special equipment at Harbor Baptist. The District supplies K.D.M. with a vision specialist at the fire hall down the street. Plaintiff receives assistance from the vision specialist for 90 minutes

twice weekly. Plaintiff concedes it is safe for K.D.M. to travel to and from the fire hall but contends the fire hall is not an appropriate educational environment.

Plaintiff seeks an injunction requiring defendants to provide the vision specialist's services at Harbor Baptist. Plaintiff agrees that it could be disruptive to allow the vision specialist to provide services to plaintiff in the regular classroom but suggests that a separate classroom at Harbor Baptist be used to provide the specialized instruction.

Oregon Administrative Rule 581-15-166 took effect May 25, 1995. It provides:

> Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> * * *
>
> (2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-150-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.
>
> (3) Such special education and related services shall be provided in a religiously-neutral setting.

The District concedes it is not providing the services of a vision specialist at Harbor Baptist because it and the State of Oregon believe Harbor Baptist is not a religiously-neutral setting.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) provides federal funding to states which comply with certain conditions. One condition is that the state provide educational services in the "[l]east restrictive environment":

> To the maximum extent appropriate, children with disabilities, including children in private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412 (5) (A) (1997).

A provision titled "Children in private schools" requires states to provide some degree of special education and related services to disabled children enrolled in private schools:

> [(A) (i)] To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, ...
>
> (I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.
>
> (II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

Under the 1997 amendments to the IDEA, however, the state's obligation to pay for services to children in private schools is limited:

> [(C) (i) Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education or related services, of a child with a disability at a private school or facility if that agency makes a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. . . .

20 U.S.C. § 1412(a) (10).

According to the House Committee Report, the IDEA, as amended, is intended to provide, "to the extent consistent with law, at State discretion, the provi[sion of] services on the premises of private, including parochial, schools." H.Rep. Comm. on Education and the Work Force No. 95, 105th Cong. 1st Sess. 1, 91 (May 13, 1997).

Defendants argue that they have met their obligations under the IDEA by offering K.D.M. a free and appropriate public education, and, therefore, they do not need to provide K.D.M. with an in-class vision specialist. Defendants rely in large part on *Goodall by Goodall v. Stafford Cty. Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), *K.R. by M.R. v. Anderson Comm. Sch. Corp.*, 125 F. 3d 1017 (1997), and *Fowler v. Unified Sch. Dist. No. 259*,——F.3d——, 1997 WL 686039 (10th Cir. 1997). The Tenth Circuit Court of Appeals held in *Fowler* that, under the 1997 IDEA amendments, a school district is not required to provide special education services on a disabled student's parochial school campus if the district has offered that student a free and appropriate public education. *Fowler* at *5. The Seventh Circuit reached essentially the same holding in *Anderson*, but with respect to a disabled student in a private, non-sectarian school.

Anderson, at 1019. Neither *Fowler* nor *Anderson* involved an express or *de facto* state policy which, like OAR 581-15-166, restricted services to non-religious settings. Accordingly, those cases did not address the constitutional concerns relevant here.

The Second Circuit Court of Appeals in *Goodall* and the Ninth Circuit Court of Appeals in *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992) did address the Free Exercise implications of a school district's denial of services to disabled children enrolled in parochial schools. All three judges on the Ninth Circuit panel agreed that the school district's denial of services on the student's parochial school campus imposed a burden on the student's and his parents' rights under the Free Exercise clause of the First Amendment to the United States Constitution.[1] *Zobrest*, at 1196 (Fletcher, J., joined by Rheinhardt, J.), 1205 (Tang, dissenting). Both *Zobrest* and the *Goodall* court, however, held that any impingement on the child or parents' Free Exercise rights was justified by the state's interest in avoiding an Establishment Clause violation. *Zobrest*, 963 F.2d at 1196-97; *Goodall*, 930 F.2d at 369-70.

The United States Supreme Court granted the Zobrests' petition for a writ of certiorari and reversed the Ninth Circuit's decision. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462, 2469 (1993). The Supreme Court held that the Establishment Clause of the United States Constitution does not prevent a school district from furnishing a sign language interpreter in a disabled student's parochial school. *Id.* The Court did not reach the *Zobrests'* Free Exercise claim

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[1] The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

because the Zobrests did not challenge that part of the decision. *Id.* at 2465 n.5.

While defendants argue that *Zobrest* merely establishes that a school district may provide special education on parochial campuses, not that it is required to do so, the Court's decision in *Zobrest* reaches further than defendants suggest in that it undercuts the courts of appeals' Free Exercise reasoning in both *Goodall* and *Zobrest*: absent an Establishment Clause violation, there remains no compelling reason to violate the student and his parents' Free Exercise rights. Like the policy addressed in *Zobrest*, OAR 581-15-166 imposes a burden on K. D. M.'s and his parents' free exercise rights by forcing them to choose between enrolling at Harbor Baptist and receiving special education at the fire hall or enrolling at a non-religious school and receiving in-class services. Under United States Supreme Court precedent, neither federal nor state anti-establishment concerns justify such an intrusion. *See Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (antiestablishment concerns arising out of state constitution are limited by Free Exercise clause); *see also Zobrest*, 963 F.2d at 1205 (Tang, J., dissenting); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). OAR 581-15-166 violates the Free Exercise clause of the First Amendment to the United States Constitution.

OAR 581-15-166 is infirm on other constitutional grounds. The Establishment Clause permits neutral state polices that have incidental effects on religious institutions, *e.g., Zobrest*, 509 U.S. at 14, but it prohibits states from engaging in activities that entail "excessive entanglement between church and state." *Agostini v. Felton* — U.S. —, 117 S. Ct. 1997, 2002 (1997). OAR 581-15-166 imposes an obligation on the Superintendent to decide, on a case by case basis, whether particular settings are religious. If an education site-be it a fire house, home school, or private school-contains a Menorah on a table, a Psalm on the wall, a nativity scene in

the corner, or the complete works of L. Ron Hubbard on a shelf, OAR 581-15-166 would require a state administrator to decide whether that setting is "religious" and, therefore, qualified for educating disabled students. In trying to keep church and state at arm's length, OAR 581-15-166 runs the risk of promoting head-on collisions.

OAR 581-15-166 also implicates the Equal Protection clause of the United States Constitution. Though defendants argue the regulation distinguishes on the basis of "settings," it can hardly be denied that OAR 581-15-166 has the effect of allowing in-class services to disabled students at non-religious schools while prohibiting in-class services to disabled students at religious schools, both public and private. The Ninth Circuit held in *Zobrest* that the Equal Protection clause permits such a distinction in light of the state's interest in avoiding an Establishment clause violation. Absent an anti-establishment interest, however, such a distinction lacks a rational, let alone compelling, justification.[2]

In addition to a declaration that OAR 581-15-166 is unconstitutional, plaintiff seeks specific enforcement of his right to a vision specialist in a Harbor Baptist classroom. Defendants are enjoined from enforcing OAR 581-15-166 and from following a policy of providing special education and related services to disabled students at religious schools on different terms than provided to disabled students at non-religious schools. As long as defendants provide IDEA

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[2] While the Ninth Circuit in *Zobrest* applied rational basis scrutiny, the existence of a fundamental Free Exercise right may warrant a compelling interest standard. The higher standard may also be warranted by the amalgamation of equal protection and substantive due process rights. *See Zobrest* 494 U.S. at 881-82; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing the right of parents and guardians to direct their children's education).

Defendants have not suggested any justification aside from Oregon's anti-establishment concerns.

benefits on such a basis, however, neither the IDEA nor the United States or Oregon constitutions impose an obligation to provide a vision specialist to K.D.M. While the IDEA mandates a regular educational environment "to the maximum extent appropriate," its recent amendments make clear that a district's provision of services is not required if a parent opts out of a free and appropriate public education. Thus, a district may refuse to provide special education and related services to private school students whose parents opt out of free and appropriate public education as long as the district does not create a distinction based on religious settings and otherwise complies with the IDEA.

The court need not address plaintiff's claims under the Oregon Constitution or the Religious Freedom Restoration Act. Because there is no evidence that defendant Paulus intentionally or recklessly violated plaintiff's clearly established constitutional rights, *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), plaintiff is not entitled to relief on his claim under 42 U.S.C. § 1983.

CONCLUSION

The decision of the Superintendent is reversed and judgment entered in favor of plaintiff on counts three and four of his Complaint (#1). As the prevailing party, plaintiff is entitled to his reasonable attorney fees. 20 U.S.C. § 1415 (i) (3) (B) (1997)

DATED this 18th day of December, 1997.

/s/ Michael R. Hogan
Michael R. Hogan
United States District Judge

CERTIFICATE OF SERVICE

I certify that I served the foregoing Civil Appeals Docketing Statement upon the below listed parties, on February 4th, 1998, by mailing a certified true copy with postage prepaid, to said parties at their regular mailing addresses as shown below:

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APPENDIX D

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION

DOE Case # DP95-141
Ref. No. 53341

IN THE MATTER OF THE EDUCATION OF K.D.M.

v.

REEDSPORT SCHOOL DISTRICT

DATE OF HEARING REQUEST:	August 10, 1995
DATE OF HEARING:	September 11, 1995[1]
DATE OF ORDER:	Novermber 20, 1995
PLACE OF HEARING:	Salem, Oregon[2]
HEARING OFFICER:	Kim Scranton
CLAIMANT'S REPRESENTATIVE:	Charles Craze, Attorney
DIVISION REPRESENTATIVE:	Bruce Zagar, Attorney
WITNESSES:	None

ISSUE:

Shall Reedsport School District provide a vision specialist for K.M. in his classroom at Harbor Baptist Church School?

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[1] Parties stipulated to facts. Hearing was opened only to determine due dates for submitting written briefs. Written simultaneous briefs to be postmarked by October 3.

[2] The hearing was conducted by telephone. The hearing office was located in Salem, Oregon.

FINDINGS OF FACT:

1. K.D.M., the child of B.M. and G.M., is a child of compulsory school age currently residing at 563 Elm Avenue, Reedsport, Oregon 97467, which is in the Reedsport School District (District), part of the Coos Education Service District.

2. K.D.M. is legally blind and has cerebral palsy. As such, he falls within the meaning of the term "children with disabilities" as defined in the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1401(a).

3. K.D.M. is entitled to receive assistance from the State of Oregon on the basis of his disability under the IDEA, and has received such assistance by means of a vision specialist and other special equipment. He has received such assistance from the District through its contract with the Coos Education Service District since he was approximately one year of age.

4. The District has not provided a vision specialist to K.D.M. in his classroom since he began attending the Harbor Baptist Church School in Reedsport, Oregon, in 1993. The Harbor Baptist Church School is a sectarian religious school.

5. The District has continued to supply K.D.M. with a vision specialist and those services have been provided at the fire hall in Winchester Bay, Oregon, across the street from the Harbor Baptist Church School, and the District has continued to supply him with braillers, computers, and other special equipment at his school. K.D.M. receives assistance at the fire hall for approximately 90 minutes, twice per week. These services by the District are in compliance with K.D.M.'s individualized education plan, the adequacy of which is not in dispute.

6. K.D.M.'s parents enrolled him in the Harbor Baptist Church School based on their sincerely held religious conviction and beliefs.

7. The vision specialist could provide services to K.D.M. in his regular classes. However, such an arrangement could prove disruptive to both K.D.M.'s instruction and the instruction of the other students. K.D.M.'S parents suggest that a separate room at the Harbor Baptist Church School be used to provide K.D.M.'s specialized instruction.

8. K.D.M. is not being provided the services of a vision specialist in his regular classroom at the Harbor Baptist Church School by the District because of the religious nature of the school. This is the sole issue in dispute.

9. Up until May 25, 1995, and at all relevant times prior to that date, the Oregon Administrative Rules promulgated by the Oregon Department of Education provided for the following:

"School District Responsibility for Children in Private Schools

581-15-166:

(1) School Districts shall make available special education designed to meet the needs of resident handicapped children in private schools. Such special education shall not be provided in the private school.

(2) School Districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs."

10. On May 25, 1995, with the signing of the new Oregon Administrative Rule by the Superintendent of Public Instruction, Norma Paulus, a revised rule became effective,

thus governing the conduct of the District. New OAR 581-15-166 provides as follows:

> "Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> (1) If a child with a disability, who is age three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-15-171, the Department of Education shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.
>
> (2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-15-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs."

CONCLUSIONS AND REASONS:

The governing statute applicable to the facts is the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 *et seq.*), which was implemented by the U.S. Department of Education through regulations published at 34 C.F.R. §§ 300.1 *et seq.* The IDEA requires that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs (§ 1400(c)). Further, § 1412 (2) (B) requires any State desiring to qualify under this statute to demonstrate, among other things, that "a free appropriate education will be provided for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978. . . ." 34 C.F.R. §300.452 makes it clear that "[e]ach LEA [Local Educational Agency] shall provide special education and related services designed to meet the needs of private school children with disabilities in the jurisdiction of the agency," and cites 20 U.S.C. 1413(a) (4) (A) and 1414(a)(6) as authority.

All disabled children must be provided services under the IDEA. This is true even if the parents of the child choose to send the child to a private school. Title 34 C.F.R. § 300.403 provides that if a child with a disability has a free and appropriate public education available and the parents choose to place the child in a private school or facility, the public agency is not required to pay for the child's education at the

private school facility. "However, the public agency shall make services available to the child as provided under §§ 300.450-300.452". 34 C.F.R. § 300.403.

Claimant argues that the Individuals with Disabilities Education Act requires that K.D.M.'s vision specialist and any other aid be provided in the regular educational environment. He argues that parents have a fundamental right to direct the upbringing of their children, including the right to choose the type of education they receive. Section 300.452 requires each LEA to "provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency."

In Oregon, school districts must make available special education designed to meet the needs of resident handicapped children in private schools. The regulation requires special education and related services be provided in a religiously neutral setting. OAR 581-15-166(3).

The U.S. Department of Education's administrative regulations for the IDEA are found in 34 C.F.R. §§300.1 *et seq.* According to section 300.533, Placement Procedures, each public agency is to

> "(4) Ensure that the placement decision is made in conformity with the LRE rules in §§300.550-300.554."

Section 300.550 gives the general requirements for ensuring that a child is placed in the least restrictive environment, and states:

> "(a) Each SEA shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.550-300.556.
>
> "(b) Each public agency shall ensure-
>
> "(1) That to the maximum extent appropriate, children with disabilities, including children in

public or private institutions or other care facilities, are educated with children who are nondisabled; and

"(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

20 U.S.C. 1412(5)(B); 1414(a)(l)(C)(iv).

K.D.M. is attending a private school with nondisabled students. K.D.M. requires vision services. He is being educated in a separate classroom at his school. His parents want the vision services provided in the separate classroom. The school district alleges they cannot provide the services at the private school. The services are provided at a nearby fire hall because Oregon law prohibits the services from being provided in the school. In this instance, the school district is providing the student with special education services to the maximum extent possible. 34 CFR 300.550. There is no requirement that IDEA requires services to be provided in a religious school. 34 C.F.R. 300.403. *See also Goodall v. Stafford County School*, 930 F2d 363, cert den, 502 U.S.—— 112 SCt 188 (1991).

In K.D.M.'s circumstances, it cannot be argued that the visual therapy services provided in the fire hall are preventing his education with other students when if that service were provided in the private school in a separate room from other students, it would be no more beneficial.

Claimant argues that the Establishment Clause of the U.S. Constitution's First Amendment does not prohibit the placement of K.D.M.'s vision specialist in Harbor Baptist Church School.

In *Zobrest v. Catalina Foothills School District*, 125 L.Ed. 2d 1 (1993), the parents of a disabled child chose to send the child to a Roman Catholic sectarian high school. When they requested that the school district provide a sign-language interpreter, their request was denied on the basis that to do so would be a violation of the Federal Constitution. The United States Supreme Court reversed the U.S. Ninth Circuit Court of appeals and held that, pursuant to the Individuals with Disabilities Education Act (IDEA), it is *constitutionally permissible* to allow a public school district to provide a sign-language interpreter to accompany a deaf student to classes in a sectarian religious school. The court reasoned that the IDEA benefits went to the child who qualifies as "handicapped" under the IDEA, not to the sectarian organization, and thus were not impermissible.

It does not require placement of the vision specialist in the private school nor does it support claimant's contention that the OAR is contrary to law.

Claimant argues that Article I, Section 5, of the Oregon State Constitution does not prohibit the placement of K.D.M.'s vision specialist in Harbor Baptist Church School.

States must comply with Federal requirements if they accept special education payments. The law accommodated the states in allowing some flexibility in administering the program where the requirements of special education would come into conflict with issues of church and state or the nature of the disability. It was important that special education be provided to individuals in need of it regardless of religious affiliation. The federal regulations allow school districts to make modifications in what is provided as well as where the services are provided, keeping mindful of the "least restrictive environment" and the "maximum extent appropriate" requirements, assuring they are educated with children who are not disabled.

The School District argues that Article I, Section 5 should not be interpreted identically to the federal Establishment Clause. In *Cooper v. Eugene School District*, 723 P2d 298, 306 Or 1986, the court held that only "sometimes" is the interpretation the same and traditionally the provision of the State constitution has been construed more strictly than the federal Establishment Clause.

The SEA School districts must walk a fine balance between the requirements of 20 U.S.C. and the Oregon Constitution. School districts may provide the services at public schools or at a neutral site and the Reedsport School District provides the service at a neutral site.

The reality of the circumstances is that vision services are provided to a student who is eligible for special education. The services are provided at a religiously neutral setting across the street from the parochial school. The services are paid regardless of the location of the provided service. The student benefits and the school benefits. Where the benefit is a function of education, both benefit.

Claimant argues that refusal to place the vision specialist in his school is impermissibly hostile toward religion. The First Amendment to the U.S. Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The IDEA, 20 U.S.C. § 1401 (a), promotes accommodation. The purpose of 20 U.S.C., Section 1400 was to assure that all children have available to them a free and appropriate education. The school district is reasonably accommodating K.D.M. by providing him with a vision specialist within the constraints of the regulations adopted by the State of Oregon as it relates to students attending private religious schools. The parents have elected to place K.D.M. in a private school. The State has complied with the IDEA and with State regulations by making services available to K.D.M. as provided under §§ 300.450-300.452. There is no

evidence that the action taken by the school district prevents K.D.M from practicing his religion or that the action prevents access to the vision specialist.

In interpreting the Equal Access Act, 20 U.S.C. §§ 4071-74 (1988), the United States Supreme Court held in *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990) that, "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Claimant argues that to deny the visual specialist in his school setting merely because that school is religious subjects him to unique disabilities not faced by similarly situated students and as such it denies K.D.M. equal participation in the IDEA program. The facts differed substantially from the facts of the instant case. In *Mergens* the issue involved participation in a private school club that was not related to a specific curriculum. Additionally, the age of the students was considered. The court considered that secondary school students were mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The courts determined that the Equal Access Act did not on its face contravene the Establishment Clause.

Claimant alleges that the failure to provide a vision specialist at Harbor Baptist Church School is a violation of 42 U.S.C. § 1983. It provides in part that "[ev]ery person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutions and the laws, shall be liable to the party injury in an action at law, suit in equity, or other proceeding for redress."

Zobrest does not require districts to provide special education services in a parochial school. In Oregon, the State has taken a position of neutrality consistent with the Oregon Constitution and adopted Administrative Rules which prohibit the provision of special education in a religious setting. The school district is providing special education to K.D.M., in compliance with the Oregon Administrative Rule, at a religiously neutral site.

The courts have been consistent in interpreting Article I, Section 5 of the Oregon Constitution regarding religious neutrality. The court contended in *Dickman v. School District 62C*, 232 Or. 238 (October 1962) that the wall of separation in the state of Oregon must be kept "high and impregnable" to meet the demands of Article I, Section 5.

The State is required to be neutral. *Zobrest* does not mandate provision of services in the private school. It allows it in some circumstances. Nothing in *Zobrest*, IDEA or the federal regulations makes provision of on-site services mandatory. The District is in compliance with IDEA, federal regulations, the Oregon Constitution and the Oregon Administrative Rules.

The hearing officer affirms for the school district.

ORDER:

Reedsport School District may continue to provide a vision specialist for K.D.M. at the fire hall.

Nov. 20, 1995

/s/ Kim Scranton,
KIM SCRANTON
Hearing Officer

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any circuit court of competent jurisdiction, ORS 343.175, or in the United States

District Court, 20 USC 1415(e) (2). Failure to request review within the time allowed will result in LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.

ENTERED at Salem, Oregon Nov 20, 1995 with copies mailed to:

Carol Esch, Oregon Department of Education, Public Service Building, 255 Capitol NE, Salem, Oregon 97310-0203

/s/ Patrica Jones
PATRICA JONES

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing FINAL ORDER in Case No. DP95-141 on the parties and attorneys named below on this 20th day of November 1995 by depositing a copy of said document in a sealed envelope in the United States Mail at Salem, Oregon, with the postage thereon fully prepaid, and addressed to:

Bill and Gwen Moore
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James Robinson, Superintendent
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/s/ Patrica Jones
PATRICA JONES

APPENDIX E

Education Code

20 U.S.C. §1412 (a)

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f) of this section:

(I) Amounts expended for the provision of those services by a local educational agency shall be

equal to a proportionate amount of Federal funds made available under this subchapter.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) Child-find requirement

The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. §1415 (e)

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process–

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this

section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil

proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

APPENDIX F

Oregon Administrative Rules
(filed through May 15, 2000)

581-015-0166

Public Educational Agency Responsibility for Children Placed by Parents in Private Schools

(1) If a child with a disability, who is age three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-015-0171, the Department of Education shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-015-0171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for

equitable participation in special education consistent with the number of children and their needs.

Stat. Auth.: ORS 343.041, ORS 343.055 & CFR § 76.650

Stats. Implemented: ORS 343.155

Hist.: 1EB 28-1978, f. & ef. 7-20-78; 1EB 25-1980, f. & ef. 11-7-80; EB 12-1995, f. & cert. ef. 5-25-95

581-015-0171

Determination of Needs Number of Children and Types of Service through Consultation Process

(1) For purposes of this rule, "public educational agencies" means:

(a) The Department of Education for children who age three through the age of eligibility for kindergarten; and

(b) School districts for children who are at the age of eligibility for kindergarten through age 21.

(2) Public educational agencies shall consult with appropriate representatives of children with disabilities enrolled by their parents in private schools during all phases of the development and design of the special education services to be provided to private school children with disabilities, including consideration of:

(a) Which children shall receive services;

(b) How the needs of children shall be identified;

(c) What services shall be provided;

(d) How services shall be provided, including the location for the delivery of those services; and

(e) How the services shall be evaluated.

(3) The public educational agency shall consult with appropriate representatives of children with disabilities

enrolled by their parents in private schools before the public educational agency makes any decision that affects the opportunities of those children to receive special education services.

(4) The public educational agency shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this rule.

Stat. Auth.: ORS 343.041 , ORS 343.045 & ORS 343.055

Stats. Implemented: ORS 343.041 , ORS 343.055 & CFR § 76.650

Hist.: 1EB 28-1978, f. & ef. 7-20-78; EB 13-1995, f. & cert. ef. 5-25-95